ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-5272

LENEUOTI FIAFIA TUAUA, *et al.*, Appellants,

v.

UNITED STATES OF AMERICA, *et al.*, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES

Appellants are Leneuoti Fiafia Tuaua, Va'aleama Tovia Fosi, Fanuatanu Fauesala Lifa Mamea, on his own behalf and on behalf of his minor children, M.F.M., L.C.M., and E.T.M., Taffy-Lei T. Maene, Emy Fiatala Afalava, and the Samoan Federation of America, Inc., the plaintiffs in the District Court. Appellees are the United States of America, United States Department of State, John Kerry, in his official capacity as Secretary of State, and Michele Bond,[1] in her official capacity as Acting Assistant Secretary of State for Consular Affairs, defendants below. In the proceedings below, Congressman Eni F.H. Faleomavaega participated as *amicus curiae*. In this appeal, Congressman Faleomavaega and the American Samoa Government jointly filed a Motion to Intervene or, in the Alternative, for Leave to Participate as *Amici Curiae*.

Additionally, the Court has granted the participation of the following *amici curiae*: Congresswomen Madeleine Z. Bordallo, Donna Christensen, Carl Gutierrez, Pedro Rossello, Michael D. Ramsey, Charles W. Turnball, Holly Brewer, Linda Bosniak, Kristin Collins, Rose Cuison-Villazor, Stella Elias, Linda Kerber, Bernadette Meyler, Nathan Perl-Rosenthal, Lucy E. Salyer, Rogers Smith,

[1] Pursuant to Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Michelle Bond, Acting Assistant Secretary of State for Consular Affairs is automatically substituted for Janice Jacobs, former Assistant Secretary of State for Consular Affairs.

Charles R. Venator-Santiago, Anthony M. Babauta, David B. Cohen, Kim M. Ballentine and Samuel Erman (explicitly in support of Plaintiffs); and Gary S. Lawson, Christina Duffy Ponsa, Sanford V. Levinson, Bartholomew H. Sparrow, and Andrew Kent (not explicitly in support of Plaintiffs).

II. RULINGS UNDER REVIEW

The ruling under review is the Honorable Richard J. Leon's June 26, 2013 Memorandum Opinion granting the motion to dismiss Appellants' complaint. (JA at 38-54.).

III. RELATED CASES

This case has not previously been before this Court and counsel for Appellees are unaware of any related cases.

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GLOSSARY

INA means the Immigration and Nationality Act, found primarily in Title 8 of the United States Code

FAM means the Foreign Affairs Manual published by the Department of State

ISSUES PRESENTED

In the opinion of Appellees, the following issues are presented:

I. Whether the District Court correctly found that the State Department's placement of a stamp on Appellants' passports indicating that the bearers are U.S. nationals comported with federal law.

II. Whether the District Court correctly found that persons born to non-U.S. citizen parents on the unincorporated territory of American Samoa are non-citizen, U.S. nationals pursuant to the U.S. Constitution and federal law.

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APPEAL FROM THE UNITED STATES DISTRICT
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STATEMENT OF JURISDICTION

The District Court's jurisdiction was premised on a federal question under 28 U.S.C. § 1331, namely a suit against the United States and Government employees pursuant to the Administrative Procedure Act, 5 U.S.C. § 702. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. Plaintiffs filed a timely notice of appeal of the final judgment on August 23, 2013. (JA at 56-57.)

COUNTER STATEMENT OF THE CASE

Plaintiffs are a group of American Samoan individuals and a social services organization in the Los Angeles, California area serving the American Samoan

community there. Plaintiffs filed suit in the District Court challenging the Department of State's placement of Endorsement Code 09 on their U.S. issued passports indicating properly that the bearers are U.S. nationals, but not U.S. citizens. The Department of State places this designation to conform with federal immigration law, specifically the Immigration and Nationality Act ("INA") § 101(a)(29), 8 U.S.C. § 1101(a)(29), which designates American Samoa as an "outlying possession" of the United States. Persons born to non-U.S. citizen parents in an outlying possession of the United States on or after its date of acquisition are nationals, but not U.S. citizens at birth. INA § 308(1), 8 U.S.C. § 1408(1).

Plaintiffs challenged this designation by arguing that by virtue of their birth on American Samoa, they are U.S. citizens by birthright and the District Court should declare the Department of State's endorsement code invalid, while also declaring Plaintiffs citizens of the United States pursuant to the Fourteenth Amendment to the U.S. Constitution. No court that has examined claims similar to Plaintiffs' has ever held that such relief is available from the judicial branch. The District Court examined Plaintiffs' claims and found that the Department of State's actions were proper under federal law and that Plaintiffs were not birthright citizens under the Fourteenth Amendment. The District Court dismissed for failure to state a claim on June 26, 2013. This appeal followed.

COUNTER STATEMENT OF FACTS

The individual Plaintiffs in this case, Leneuoti Fiafia Tuaua, Va'aleama Tovia Fosi, Fanuatanu Fauesala Lifa Mamea, on his own behalf and on behalf of his five minor children (M.F.M., L.C.M., and E.T.M., Taffy-Lei T. Maene, Emy Fiatala Afalava), are United States nationals born in American Samoa. Additionally, the Samoan Federation of America, Inc., was a Plaintiff below and described itself as a "social services organization that serves the Samoan community in the greater Los Angeles area." (JA at 17.) Plaintiff Tuaua alleged that he was born in American Samoa in 1951, and currently resides in American Samoa. (JA at 11.) From 1969 to 1976, he lived in Daly City, California, and was unable to vote under California law because he was a non-citizen national. (*Id.*) Tuaua did not allege that during the seven year period he lived in California that he ever applied for naturalization as a U.S. citizen. (*Id.*) He moved back to American Samoa and had a 30-year law enforcement career there. (JA at 12.) Tuaua claims to seek a passport that states he is a U.S. citizen so he can "enjoy the same rights and benefits and be eligible for the same opportunities as all other persons born in the United States." (*Id.*) Tuaua has two children – ages 10 and 15 – and states that

he would like for them to grow up having all of the opportunities of U.S. citizens and not be classified as "non-citizen nationals."[2] (*Id.*)

Plaintiff Fosi alleged that he was born in American Samoa in 1965, but currently lives in Honolulu, Hawaii. (*Id.*) Fosi did not allege that he has ever been denied an opportunity to naturalize and, therefore, become a U.S. citizen while present in the United States. (*Cf. id.*) Fosi did allege that while in college in Hawaii, he was ineligible for federal work study programs and certain other federal employment opportunities as a non-citizen national. (*Id.*) Fosi served in the Army Reserve and Hawaii National Guard, and believed he had been naturalized in 1987 in connection with his service, but when he renewed his passport in 1999, it stated he was a non-citizen national. (JA at 13.) He alleged that, as a U.S. national, he cannot vote or bear arms in Hawaii. (*Id.*) Fosi demanded a U.S. passport that states he is a U.S. citizen. (*Id.*)

Another Plaintiff, Mamea, alleges that he was born in American Samoa in 1941. (*Id.*) Mamea attempted to assert claims on behalf of himself and his three minor children: MFM – 5; LCM – 4; and ETM – 2, all of whom were allegedly

[2] Had Tuaua naturalized during his time in California, his children would have been birthright citizens pursuant to federal immigration law. 8 U.S.C. § 1401(e) ("a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person" shall be a U.S. citizen and national at birth).

born in American Samoa. (JA at 13-14.) Mamea and all three children have U.S. passports stating that they are non-citizen nationals. (JA at 14.) Mamea asserted that he enlisted in the U.S. Army in 1964, and was honorably discharged in 1984. (*Id.*) Mamea does not allege that he sought naturalization under the special exemption afforded by Congress to members of the military serving during hostilities, in Mamea's case, the Vietnam conflict. *See* 8 U.S.C. § 1440(a).

Prior to his discharge, he resided in Hawaii, California, South Carolina, and Washington, but, as a non-citizen national, was not able to vote in local elections. (*Id.*) Mamea did not allege that he was denied the opportunity to naturalize while residing in the United States. Mamea did allege that he has previously traveled to Hawaii to receive treatment at a Veterans Hospital as an 80% combat-disabled veteran, and anticipates needing to do so again. (*Id.*) He alleged that due to his non-citizen national status, he cannot obtain easily an immigrant visa for his wife (a Tongan national) as an immediate relative of a U.S. citizen. (*Id.*)

Plaintiff Taffy-lei T. Maene alleged she was born in American Samoa in 1978, and currently lives in Seattle. (JA at 15.) Maene did not allege that she has been denied the opportunity to naturalize while residing in Seattle. Maene did allege she was issued a U.S. passport in 1995 listing her as a non-citizen national. (*Id.*) Maene alleged she was hired by the Washington State Department of Licensing, but was removed from that position because she was not able to

demonstrate that she was a citizen of the U.S. (*Id.*) She also alleged she has been deterred from applying for federal jobs requiring citizenship as a prerequisite, since she is a non-citizen national. (*Id.*) Maene stated that she is not eligible to vote in Washington State, where she has resided since 2006. (*Id.*) Further, she alleged that she cannot receive an "enhanced driver's license" to travel to Canada because she is a non-citizen national. (JA at 16.) Finally, she asserted that she is unable to sponsor her mother, a Samoan national, for immigration to the United States as a non-citizen national. (*Id.*)

Plaintiff Afalava alleged he was born in American Samoa in 1964, and resides there. (*Id.*) He claimed that his U.S. passport, issued in 2012, describes him as a non-citizen national. (*Id.*) Afalava also stated that he lived in the continental United States for 13 years, including in Texas, Oklahoma and California. (JA at 17.) Afalava did not allege that he was prevented from naturalizing during that time period. Additionally, Afalava served in the U.S. Army, including a deployment during Operations Desert Shield and Desert Storm to liberate Kuwait. (JA at 16-17.) Afalava did not allege that he sought to naturalize under the special exemption afforded by Congress to members of the military serving during hostilities. *See* 8 U.S.C. § 1440(a). He alleged that he could not vote as a non-citizen national. (JA at 17.)

Plaintiff American Samoan Federation, Inc., is a Section 501(c)(3) tax-exempt organization that serves the Samoan community in the greater Los Angeles area. (*Id.*) The Federation stated that its activities include helping to promote political empowerment of the Samoan community in California. (*Id.*) The Federation further alleged that it expends resources helping American Samoans with the naturalization process, and could use those funds for other purposes if the United States deemed American Samoans to be citizens in the absence of naturalization. (*Id.*) The Federation did not allege that any American Samoans residing in California that it assisted were denied naturalization to U.S. citizenship.

Brief Summary of Relevant American Samoan History as the Archipelago Relates to the United States of America

The Samoan Islands are an archipelago in the Pacific; the eastern portion of the archipelago became known as "American Samoa" after a Convention to Adjust the Question between the United States, Germany, and Great Britain in Respect to the Samoan Islands signed at Washington on December 2, 1899, and ratified on February 16, 1900, in which Great Britain and Germany ceded claims to American Samoa to the United States. 31 Stat. 1878. Congress accepted, ratified and confirmed the voluntary cessions of territory signed by Samoan chiefs retroactive to April 10, 1900 and July 16, 1904, by the Ratification Act of February 20, 1929, 45 Stat. 1253, which provided that until Congress should provide for the

government of such islands, all civil, judicial and military powers should be vested in such person or persons and exercised in such manner as the President of the United States should direct, with power in the President to remove officers and fill vacancies.

The President, through Executive Order No. 125-A, directed the Department of the Navy to exercise control over and administer the islands comprising American Samoa. Subsequently, the President, by Executive Order No. 10264, dated June 29, 1951, to become effective July 1, 1951, 48 U.S.C. § 1431 (note), transferred the administration of American Samoa from the Secretary of the Navy to the Secretary of the Interior, directing that the latter "take such action as may be necessary and appropriate, and in harmony with applicable law, for the administration of the civil government in American Samoa." The administration of American Samoa by the Department of the Interior continues presently.

Finally, the people of American Samoa have drafted, voted on, and implemented a constitution to govern them. *See* Const. of Am. Samoa, *available at* http://faleomavaega.house.gov/american-samoa/historical-documents/revised-constitution-of-american-samoa (last visited July 31, 2014). This constitution contains several critical provisions distinct from the U.S. Constitution, including, but not limited to, Section 3 of Article I, which memorializes the responsibility of the government of American Samoa to preserve the traditional American Samoan

way of life. *See* Const. of Am. Samoa, art. I, § 3.

SUMMARY OF ARGUMENT

Plaintiffs' challenge to the Department of State's placement of Endorsement Code 09 on non-citizen U.S. nationals' passports properly failed because, as Plaintiffs readily acknowledged, federal law creates the need for such a designation. In fact, Congress has specifically contemplated Plaintiffs as non-U.S. citizens of American Samoa and bestowed the status of automatic U.S. national, but not birthright citizen. Thus, Endorsement Code 09 is plainly correct and fully conformed with federal law.

The requested relief, a judicial decree of automatic, birthright citizenship that overturns a significant portion of federal immigration law, is not only improper under the law, but also overlooks the compelling interests that both the U.S. Government has in preserving Congress's unfettered discretion in determining when citizens of a territory may acquire birthright citizenship, and the Government of American Samoa's interest in preserving the *fa'a Samoa* or Samoan "way of life" that would be altered by an unprecedented judicial grant of birthright citizenship on an entire territory.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the grant of a motion to dismiss *de novo* and "may affirm the dismissal of a complaint on different grounds than those relied upon by the district court." *Amgen, Inc. v. Smith*, 357 F.3d 103, 111 (D.C. Cir. 2004); *see also Kim v. United States*, 632 F.3d 713, 715 (D.C. Cir. 2011) (citing *Atherton v. D.C. Office of Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009)). A complaint must present factual allegations that are sufficiently detailed "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

The District Court, meanwhile, may dismiss a complaint for failing to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6) is proper if a complaint fails to plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570 (clarifying the standard from *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Twombly*, 550 U.S. at 570). Thus, under Rule 12(b)(6), the District Court must focus on the language of the complaint and whether it sets forth sufficient factual allegations to support the plaintiffs' claim for relief. *Twombly*, 550 U.S. at 555; *see also Chung v. Chao*, 518 F. Supp. 2d 270, 273 n.3 (D.D.C. 2007) ("'[w]ithout some factual allegation in the complaint, it is hard to see how a [plaintiff] could satisfy the requirement of providing not only

'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests.'") (quoting *Twombly*, 550 U.S. at 556 n.3)).

The Court must construe the factual allegations in the complaint in the light most favorable to the plaintiff and must grant the plaintiff the benefit of all inferences that can be derived from the facts as they are alleged in the Complaint. *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004) (citing *Kowal v. MCI Commc'n Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)). The Court, however, can begin "by identifying pleadings that, because they are no more than [legal] conclusions, are not entitled to the assumption of truth," in its consideration of whether the district court was correct in dismissing Plaintiffs' complaint. *Iqbal*, 556 U.S. at 679.

II. THE DEPARTMENT OF STATE'S RECOGNITION OF NON-U.S. CITIZEN NATIONALITY AND PLACEMENT OF ENDORSEMENT CODE 09 ON PLAINTIFFS' PASSPORTS IS IN ACCORDANCE WITH FEDERAL STATUTORY LAW.

Plaintiffs' complaint in the District Court rested on a challenge to the Department of State's placement of Endorsement Code 09 on Plaintiffs' passports indicating properly that the bearer is a U.S. national, but not a U.S. citizen. (*See* JA at 27-28, 31-33.) Plaintiffs reassert in their initial brief that the Department of State "classif[ies] the Individual Plaintiffs as so-called 'non-citizen nationals' of the United States, as reflected in Section 308(1) of the Immigration and Nationality

Act of 1952 ('INA') (codified at 8 U.S.C. § 1408(1)) and the State Department's Foreign Affairs Manual ('FAM') at 7 FAM § 1125.1(b)-(c)." (JA at 10, ¶ 6.) Plaintiffs allege that as a result of this "classification," persons who are born in American Samoa "do not have the same rights and privileges as do persons classified as 'citizens' of the United States." (JA at 10 ¶ 8.)

Plaintiffs sought to review the Department of State's action under the Administrative Procedure Act, 5 U.S.C. § 702 *et seq*., alleging that the Department of State's "policy and practice of imprinting Endorsement Code 09 in the passports of persons born in American Samoa, including the Individual Plaintiffs, is 'contrary to constitutional right' and is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A), (B)." (JA at 10 ¶ 74.) But Plaintiffs also acknowledged that the Department of State's imprinting of Endorsement Code 09 conforms with federal statutory law, which distinguishes between non-citizen U.S. nationals and U.S. citizens. (JA at 10, ¶¶ 6-7 (noting that the "State Department has given effect to the 'non-citizen national' classification by imprinting" Endorsement Code 09, implementing INA, 8 U.S.C. § 1408(1).) Thus, Plaintiffs could not have stated a valid claim as they concede that the Department of State's placement of Endorsement Code 09 on Plaintiffs' passports is consistent with federal statutory law and is not arbitrary nor capricious.

A. Congress, Not the Department of State, Has Deemed that Plaintiffs Acquired U.S. Nationality but Not U.S. Citizenship at Birth (a Status Called "Non-Citizen U.S. National").

Notwithstanding Plaintiffs' reference to Department of State regulations and guidance, Plaintiffs implicitly acknowledge it is Congress, not the Department of State, which has deemed Plaintiffs to be non-citizen U.S. nationals. The Department of State is not inventing a "classification" in derogation of its authority. Rather, Congress designated American Samoa as an "outlying possession" of the United States,[3] INA § 101(a)(29), 8 U.S.C. § 1101(a)(29), and declared that persons born to non-U.S. citizen parents in an outlying possession of the United States on or after its date of acquisition are nationals, but not U.S. citizens, at birth. INA § 308(1), 8 U.S.C. § 1408(1). In fact, this Court has expressly validated Congressional creation of such a status. *Lin v. United States*, 561 F.3d 502, 508 (D.C. Cir. 2009) ("Moreover, Congress precisely defined a non-citizen national as, *inter alia*, a person 'born in an outlying possession of the United States on or after the date of formal acquisition of such possession.' 8

[3] The term "outlying possession" of the United States is contrasted with "State" under the INA. In fact, INA § 101(a)(36), 8 U.S.C. § 1101(a)(36) defines the term "State" to include the District of Columbia, Puerto Rico, Guam, the U.S. Virgin Islands and the Commonwealth of the Northern Mariana Islands. Further, INA § 101(a)(38), 8 U.S.C. § 1101(a)(38) defines the term "United States" as the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the U.S. Virgin Islands and the Northern Mariana Islands.

U.S.C. § 1408. The term 'outlying possessions of the United States' means American Samoa and Swains Island. *Id.* § 1101(a)(29).''). Thus, the Department of State's issuance of passports to Plaintiffs that identify them as non-citizen U.S. nationals is consistent with federal law and is not arbitrary or capricious. *Lin*, 561 F.3d at 508.

B. The Department of State Has Reasonably Exercised Its Broad Authority In Issuing Passports with Endorsement Code 09 to Non-Citizen U.S. Nationals.

Federal law specifically delineates what agency may issue passports, to whom passports may be given, and what procedures must be followed. Congress memorialized the Department of State's authority to grant and issue passports in 22 U.S.C. § 211a (The Secretary of State or a designee "may grant and issue passports, and cause passports to be granted, issued and verified in foreign countries … under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports"). Pursuant to Executive Order No. 11295, 31 Fed. Reg. 10603 (Aug. 9, 1966), the President has empowered the Secretary of State with the authority "to designate and prescribe for and on behalf of the United States rules governing the granting, issuing, and verifying of passports." The Supreme Court has acknowledged this broad authority by stating: "Particularly in light of the 'broad rule-making authority granted in the [Passport Act of 1926],' a consistent

administrative construction of that statute must be followed by the courts 'unless there are compelling indications that it is wrong.'" *Haig v. Agee*, 453 U.S. 280, 291 (1981) (quoting *E.I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 55 (1977)). Even prior to the issuance of the first Passport Act in 1856, "the common perception was that the issuance of a passport was committed to the sole discretion of the Executive." *Agee*, 453 U.S. at 293. As the Supreme Court observed in 1835, "[i]t is understood, as a matter of practice, that some evidence of citizenship is required, by the Secretary of State, before issuing a passport. This, however, is entirely discretionary with him." *Urtetiqui v. D'Arcy*, 9 Pet. 692, 9 L.Ed. 276 (1835).

In exercising its broad discretion over passport issuance, the Department of State has reasonably determined that when it issues passports to non-citizen U.S. nationals, including Plaintiffs, as authorized by 22 U.S.C. § 212, it is permitted to distinguish their nationality status from U.S. citizens on such passports. Under the law, "no passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States." 22 U.S.C. § 212. As discussed above, Congress declared that persons born to non-U.S. citizen parents in an outlying possession of the United States on or after its date of acquisition are nationals, but not U.S. citizens at birth. INA § 308(1), 8 U.S.C. § 1408(1).

The Department of State's decision to issue non-citizen U.S. nationals passports with Endorsement Code 09 is further informed by 22 U.S.C. § 2705. This statute provides that a full validity, unexpired U.S. passport "issued by the Secretary of State to a citizen of the United States" shall have the same force and effect as proof of U.S. citizenship as a Certificate of Naturalization or a Certificate of Citizenship issued by U.S. Citizenship and Immigration Services. 22 U.S.C. § 2705. Notably, the statutory requirement that the passport must have been issued "to a citizen of the United States" in order to serve as proof of citizenship reflects Congress' recognition that a U.S. passport issued to non-citizen nationals cannot serve as proof of U.S. citizenship.[4] The Department of State's decision to place an explanatory note about a non-citizen U.S. national's status on his or her passport is a logical exercise of its broad passport authorities: Because a U.S. passport is proof of U.S. citizenship when issued to a U.S. citizen under § 2705, some mechanism is needed to distinguish passports held by U.S. citizens from those held by non-citizen U.S. nationals. Endorsement Code 09 accomplishes this necessary

[4] The text of 22 U.S.C. § 2705 was originally proposed by the Department of State in 1979, and in its transmittal letter to Congress, the Department explained that the proposed legislation "is concerned with the U.S. passport which is issued to United States citizens" and that "U.S. passports issued to nationals of the United States are not included in the draft bill." 125 Cong. Rec. 25,267, 25,268 (1979).

distinction.[5]

C. The Department of State's Regulations and Interpretation of How to Exercise its Authority under the Passport Act, Read in Conjunction with the INA, Are Entitled to Deference.

As discussed *supra*, the issuance of passports is a duty that Congress squarely delegated to the Department of State. 22 U.S.C. § 211a. Therefore, the Department of State's interpretations of how to issue passports is subject to deference. Thus, even though the INA, read in conjunction with 22 U.S.C. § 2705, creates the need for annotation distinguishing between non-citizen U.S. nationals and U.S. citizens in U.S. passports, to the extent that Plaintiffs argue that any interpretation of federal law occurred, that interpretation should receive *Chevron* deference. Per this Court's instructions, "[a]s a general matter, an agency's interpretation of the statute which that agency administers is entitled to *Chevron* deference." *Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)).

This Court's review of the agency's interpretation is a two-step process. In the first step, the Court examines the statute *de novo* to determine whether it is ambiguous. *Id.* at 842-43. If the statute is ambiguous, the Court then must

[5] Contrary to Plaintiffs' implication, they would not become U.S. citizens simply by the removal of Endorsement Code 09 from their passports. Mere possession of a U.S. passport without Endorsement Code 09 does not and cannot create U.S. citizenship status where it does not already exist.

defer to the agency's interpretation of the statute unless it is "manifestly contrary to the statute." *Id.* at 844. Thus, the second step of the *Chevron* analysis is a determination of whether the agency's interpretation of Congress' instructions is reasonable. The Court's inquiry under the second step of *Chevron* "overlaps with [the Court's] inquiry under the arbitrary and capricious standard." *Am. Fed'n of Gov't Employees, AFL-CIO, Local 446 v. Nicholson*, 475 F.3d 341, 345-46 (D.C. Cir. 2007). "Whether a statute is unreasonably interpreted is close analytically to the issue whether an agency's actions under a statute are unreasonable." *Gen. Instrument Corp. v. Fed. Commc'ns Comm'n*, 213 F.3d 724, 732 (D.C. Cir. 2000). Here, as the relevant federal statutes are clear and, as Plaintiffs admit, the Department of State has merely "given effect" to the statutes at issue, the actions at issue are plainly correct, particularly under a deferential standard of review.

Additionally, the Department of State has promulgated regulations giving effect to the statutory authorization under 22 U.S.C. § 212 to issue passports to U.S. nationals. *See* 22 C.F.R. § 51.1 *et seq.* These regulations clearly define who is eligible for a passport, namely only U.S. nationals. 22 C.F.R. § 51.2(a). Further, the regulations specify who is a "U.S. non-citizen national," that is to say, persons such as Plaintiffs upon "whom U.S. nationality, but not U.S. citizenship, has been conferred at birth under 8 U.S.C. § 1408, or under other law or treaty, and who has

not subsequently lost such non-citizen nationality." 22 C.F.R. § 51.1(m). The Department of State, however, has reasonably placed Endorsement Code 09 on Plaintiffs' passports because they are non-citizen U.S. nationals and Congress has declared that, as a general matter, valid passports are evidence of citizenship. *See* 22 U.S.C. § 2705. Thus, the Department of State's regulations permitting issuance of passports to persons such as Plaintiffs, and its placement of an endorsement code demonstrating their status as non-citizen nationals, are plainly permissible and reasonable.

D. The Department of State has Reasonably Interpreted Its Regulations to Grant Passports to Non-Citizen Nationals with Endorsement Code 09.

The Department of State has interpreted its regulations to allow the Department to issue non-citizen U.S. nationals such as Plaintiffs passports, but provide an endorsement code to preclude the document from being misinterpreted as proof of citizenship. This interpretation of its regulations is accorded deference under the rule set forth in *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *See Decker v. Envtl. Def. Center*, 133 S. Ct. 1326, 1337 (2013) ("It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail. When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation." (internal quotation and citations omitted)).

Here, the Department of State's interpretation of its regulations to require the placement of an explanatory endorsement code on Plaintiffs' passports was consistent with the statute and should be upheld, particularly under a deferential review.[6] Thus, Plaintiffs' challenge to the Department of State's issuance to them of passports with Endorsement Code 09 fails as a matter of law and the judgment of the District Court should be affirmed.

III. PLAINTIFFS' CHALLENGE TO FEDERAL IMMIGRATION LAW UNDER THE FOURTEENTH AMENDMENT ALSO FAILS.

Plaintiffs' pleading below centered on a challenge to Endorsement Code 09 and all of Plaintiffs' requested relief relied on that challenge being successful. (JA at 31-33.) For the reasons discussed immediately above, however, the Department

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[6] In addition, the Department of State's non-binding policy and procedure guidance further supports the use of Endorsement Code 09. The Department of State has issued the Foreign Affairs Manual ("FAM") to set forth guidance on a variety of topics, including the issuance of passports, a task given to the Department by Congress as discussed above. The current FAM is available at http://www.state.gov/m/a/dir/regs/fam/ (last visited July 31, 2014). The FAM notes that "American Samoa and Swains Island are not incorporated territories, and the citizenship provisions of the Constitution do not apply to persons born there." 7 FAM 1125.1(b). Thus, Plaintiffs (and similarly situated non-U.S. citizen, U.S. national residents of American Samoa) would properly receive U.S. passports with Endorsement Code 09.

Pursuant to this Court's dicta in *Miller v. Clinton*, 687 F.3d 1332, 1341 & n.9 (D.C. Cir. 2012) (declining to determine whether more informal policies such as the FAM would be entitled to deferential review), the Government does not expressly seek deferential review of the FAM, nor does the Government believe such review is necessary to resolve this case based upon the statutory and regulatory framework discussed above.

of State's usage of Endorsement Code 09 on passports of non-citizen U.S. nationals is consistent with federal law and is not arbitrary and capricious.

Plaintiffs' initial brief in this Court, however, focuses almost exclusively on a challenge to Congress's determination that American Samoa is an outlying possession of the United States and that persons born on American Samoa to non-U.S. citizen parents are not birthright citizens. *See* INA § 101(a)(29), 8 U.S.C. § 1101(a)(29); INA § 308(1), 8 U.S.C. § 1408(1). Plaintiffs and the *amici* in this case have spent dozens of pages discussing their interpretations of the Citizenship Clause of the Fourteenth Amendment and its legislative history. The plain language of the Clause, though, particularly when reviewed in the context of the rest of the Constitution and coupled with over 100 years of consistent judicial interpretations reveal that Plaintiffs' challenge fails. In fact, Plaintiffs have not (and cannot) identify a single court ever having declared an entire territory's citizens entitled to birthright citizenship under the Fourteenth Amendment, but instead, each court to have examined the issue has held that the Amendment cannot be read so broadly. Thus, the District Court properly dismissed Plaintiffs' complaint.

A. The Constitution and, in Particular, the Plain Language of the Fourteenth Amendment, Do Not Support Plaintiffs' Interpretation.

The first introductory words of Plaintiffs' initial brief reveal the flaw in Plaintiffs' logic and misinterpretation of the Citizenship Clause of the Fourteenth Amendment. Specifically, Plaintiffs selectively quote the Clause, stating: "The Citizenship Clause of the Fourteenth Amendment to the U.S. Constitution provides that '[a]ll persons born . . . in the United States . . . are citizens of the United States . . . .'" (Appellants Br. at 1 (quoting, in part, U.S. Const., amend. XIV, § 1, cl. 1).) The words Plaintiffs omitted and replaced with ellipses have meaning, however, and provide context. The entire clause actually reads:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

U.S. Const. amend. XIV, § 1, cl. 1. The phrases "or naturalized" and "and subject to the jurisdiction thereof" when read in conjunction with the phrase "in the United States" demonstrate precisely why Plaintiffs' claims fail as a matter of law and why every federal court to examine claims like Plaintiffs' have found them wanting—these phrases contemplate that the grant of birthright citizenship will not simply "follow the flag," but rather will be defined and confined or expanded by Congressional action.

1. The Plain Language of the Amendment

The Fourteenth Amendment's first clause plainly declares that it confers automatic birthright citizenship to persons "born in the United States and subject to the jurisdiction thereof." While the history of American Samoa's relationship with the United States outlined above, including its oversight first by the U.S. Navy and now by the Department of Interior, lends itself to placing American Samoa "subject to the jurisdiction" of the United States, it is not "in the United States." Thus, Plaintiffs' selective editing of the Amendment in the first line of their brief cannot alter the plain reading of the full text. *See, e.g., Perpich v. Dep't of Def.*, 496 U.S. 334, 339-40 (1990) (noting requirement of affirmance of judgment of lower court based on plain language of Constitution).

2. The Constitution Places Naturalization and the Definition of the Boundaries of the United States within the Purview of Congress.

The first phrase in the Amendment omitted by Plaintiffs, "or naturalized," refers to Congress's ability to determine under what terms, if any, a person may become a U.S. citizen. In fact, the Constitution vests in Congress the sole power to make laws regarding naturalization, *see* U.S. Const., Art. I, § 8, cl. 4, which the Supreme Court noted as far back as *Boyd v. State of Nebraska*, 143 U.S. 135, 160 (1892), stating, "The constitution has conferred on congress the right to establish a uniform rule of naturalization, and this right is evidently exclusive, and has always

been held by this court to be so."

Additionally, the Supreme Court in *Boyd* recognized that the ability to naturalize and obtain citizenship was not a right guaranteed by the Constitution, but rather that "Naturalization is the act of adopting a foreigner, and clothing him with the privileges of a native citizen." *Id*. at 162. Indeed, the Supreme Court has stated that "Citizenship can be granted only on the basis of the *statutory* right which Congress has created." *Schneiderman v. United States*, 320 U.S. 118, 165 (1943) (emphasis added). This conclusion, supported by the exclusive grant of naturalization regulation provided to Congress rests on the assumption "that naturalization is a privilege, to be given or withheld on such conditions as Congress sees fit." *Schneiderman*, 320 U.S. at 131.

Due to the exclusive role of Congress, courts have consistently declined to interfere with Congressional action when taken in this area. As the Supreme Court has noted:

> An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare.

United States v. Ginsberg, 243 U.S. 472, 474 (1917); *Rogers v. Bellei*, 401 U.S. 815, 830-31 (1971) (approving of Congressional scheme to provide path to citizenship for persons born abroad which could then be revoked if certain

qualifications were not met). Even more relevantly, the Supreme Court has instructed that if an individual does not qualify for citizenship under a statute, the "court has no discretion to ignore the defect and grant citizenship." *Fedorenko v. United States*, 449 U.S. 490, 517 (1981) (citations omitted). Thus, when Congress expressly provides a path to naturalization (as it has done for Plaintiffs and all other non-citizen U.S. nationals), the Court cannot simply ignore or bypass that process and declare persons citizens *de jure* or *de facto* by operation of judicial decree.

Similarly, the responsibility of Congress to govern this nation's territories has long been recognized and respected by the Courts. The "principles of constitutional liberty . . . restrain all the agencies of government" from impeding upon territories' citizens. *Murphy v. Ramsey*, 114 U.S. 15, 44-45 (1885). But it is instead Congress which has the "legislative discretion" to grant "privileges" upon those born in the outlying possessions as they see fit. *Id*. Congress "has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments [and] *may* do for the Territories what the people, under the Constitution of the United States, may do for the States. *First Nat. Bank v. Yankton Cnty.*, 101 U.S. 129, 133 (1879) (emphasis added).

Critically, the Supreme Court has never found that the Congress *must* bestow all of the same panoply of privileges upon those born in the outlying

possessions that the Constitution bestows on those born in the United States. Plaintiffs and the *amici* argue that this Court *must* bestow the privileges of birthright citizenship upon persons born in American Samoa, but such a holding would run counter to over a century of jurisprudence affirming the preeminence of Congress in guaranteeing the rights of those in the outlying possessions.

In fact, Plaintiffs' and *amici*'s reliance on an overextension of the principle of *jus soli* and English common law has already been directly rejected by the Supreme Court in *Rogers* where the Court stated:

> We thus have an acknowledgment that our law in this area follows English concepts with an acceptance of the jus soli, that is, that the place of birth governs citizenship status ***except as modified by statute***.

401 U.S. at 828 (emphasis added). Thus, even if Plaintiffs were correct that their interpretation of the Fourteenth Amendment should generally confer birthright citizenship pursuant to *jus soli* on non-citizen American Samoans, Congress's direct modification of that status by statute trumps that interpretation under Supreme Court interpretation. *See* INA § 101(a)(29), 8 U.S.C. § 1101(a)(29); INA § 308(1), 8 U.S.C. § 1408(1); *see also Rogers*, 401 U.S. at 828.

Additionally, Plaintiffs' attempt to bolster their arguments by looking to the legislative history and historical context of the Fourteenth Amendment overlooks not only the unbroken string of court decisions finding those arguments unavailing, but also ignores the plain reading of both the Amendment and the relevant statutes

where Congress has clearly addressed the status of non-citizen U.S. nationals born in American Samoa. INA § 308(1), 8 U.S.C. § 1408(1), and INA § 101(a)(29), 8 U.S.C. § 1101(a)(29). Because these statutes are clear, there is no need to look to the legislative history. *See, e.g.*, *General Elec. Co. v. Envtl. Prot. Agency*, 360 F.3d 188, 191 (D.C. Cir. 2004) ("[W]e begin and end with the language of [the relevant statute], because when the statutory text is straightforward, there is no need to resort to legislative history") (citing *United States v. Gonzales*, 520 U.S. 1, 6 (1997); *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994); *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992)). Therefore, Plaintiffs' and *amici*'s exhaustive treatment of the Reconstruction Era of the United States not only ignores the Congressional actions taken and judicial decisions rendered in the intervening almost 150 years, but also contradicts the plain language of the statutes addressing the issues in this case.

B. Every Court to Examine Claims Similar to Plaintiffs' Has Dismissed Them and Found No Basis in the Fourteenth Amendment for the Expansive View of Birthright Citizenship Urged by Plaintiffs.

Whether the Citizenship Clause applied or applies to an outlying, unincorporated territory of the United States has been examined and decided in a series of cases. In each case that courts have held that they could examine the issue, those courts have held that where Congress has not specifically enumerated

that the outlying territory is subject to the territorial scope of the Citizenship Clause, the clause does not apply to those territories. Here, as outlined above, Congress has properly exercised its Constitutional duty to legislate the naturalization status for American Samoa, an unincorporated, outlying territory. And every federal court to examine similar claims to the ones Plaintiffs raised below has found them wanting.

For example, in a series of cases in several jurisdictions, persons born in the Philippine Islands during that archipelago's period as an outlying, unincorporated territory of the United States, or persons born to parents who were themselves born in the Philippine Islands during the territorial time period, brought cases seeking a judicial determination of their citizenship. The Second, Third, Fifth and Ninth Circuits considered whether the term "United States" as used in the Citizenship Clause of the Fourteenth Amendment included the then-U.S. territory of the Philippines. Each of these Courts of Appeals held that the territorial scope of the phrase "the United States" did not extend to cover territories such as the Philippines, which was, at that time, an outlying, unincorporated territory without a path to statehood. Thus, while the archipelago might have been "subject to the jurisdiction" of the United States, the clause Plaintiffs omit from their brief, the Philippines was not a part of the United States and, therefore, automatic birthright citizenship did not extend to its inhabitants.

Specifically, in *Rabang v. Immigration & Nat. Serv.*, 35 F.3d 1449 (9th Cir. 1995), *cert. denied*, 515 U.S. 130 (1995), the court analyzed the territorial scope of the phrase "the United States." The Ninth Circuit held that the territorial scope of the phrase "the United States" in the Constitution generally, and in the Fourteenth Amendment in particular, is limited to the "states of the Union." *See id.* at 1452-53 (construing *Downes v. Bidwell*, 182 U.S. 244, 287 (1904)).[7] In relevant part, the Ninth Circuit described the *Downes* analysis as follows:

> [T]he Court compared the language of the revenue clause ("all duties . . . shall be uniform throughout the United States") with that of the Thirteenth Amendment (prohibiting slavery "within the United States, or in any place subject to their jurisdiction") and the Fourteenth Amendment (extending citizenship to those born "in the United States, and subject to the jurisdiction thereof"). *Id.* at 251 (emphasis

[7] Both Plaintiffs and *amici* spend dozens of pages attacking the Supreme Court's decision in *Downes v. Bidwell*, 182 U.S. 244, 287 (1904), claiming that the case does not contain an actual majority opinion and therefore none of its holdings are binding on this or any other court. Plaintiffs' and *amici*'s musings fall flat in light of the consistent holdings and *dicta* in a long series of Supreme Court decisions. *See, e.g.*, *United States v. Ptasynski*, 462 U.S. 74, 83 & n.12 (1983) ("In *Downes v. Bidwell*, 182 U.S. 244 (1901), the Court considered whether Congress could place a duty on merchandise imported from Puerto Rico. The Court assumed that if Puerto Rico were part of the United States, the duty would be unconstitutional under the Uniformity Clause or the Port Preference Clause. *Id.* at 249. ***It upheld the duty*** because it found that Puerto Rico was not part of the country for the purposes of either Clause. *Id.* at 287.") (emphasis added); *Torres v. Com. of Puerto Rico*, 442 U.S. 465, 468-69 (1979) ("In *Downes v. Bidwell*, 182 U.S. 244 (1901), ***we held*** that ….") (emphasis added); *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 600 & n. 30 (1976) ("The most significant of the Insular Cases is *Downes v. Bidwell*, *supra*, ***where the Court held that*** the imposition by Congress of special duties on Puerto Rican goods did not violate . . . .").

> added). The Court emphasized that the language of the Thirteenth Amendment demonstrates that "there may be places within the jurisdiction of the United States that are no part of the Union." *Id.* In comparison, the Fourteenth Amendment has "a limitation to persons born or naturalized in the United States *which is not extended to persons born in any place 'subject to their jurisdiction*.'" *Id.* (emphasis added). Like the revenue clauses, the Citizenship Clause has an express territorial limitation which prevents its extension to every place over which the government exercises its sovereignty. *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 291 n.11 (1990) (Brennan, J., dissenting) (distinguishing *Downes* holding regarding the revenue clauses, because the Fourth Amendment "contains no express territorial limitations").
>
> The *Downes* court further stated: "In dealing with foreign sovereignties, the term "United States" has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal government, wherever located. *Downes*, 182 U.S. at 263. In other words, as used in the Constitution, the term 'United States' does not include all territories subject to the jurisdiction of the United States government."

Rabang, 35 F.3d at 1452- 1453. The *Rabang* court thus held that it is "incorrect to extend citizenship to persons living in the United States simply because the territories are 'subject to the jurisdiction' or 'within the dominion' of the United States, because those persons are not born 'in the United States' within the meaning of the Fourteenth Amendment." *Id.* at 1453. The Ninth Circuit's decision in *Rabang* has been followed by the Second Circuit, *Valmonte v. INS*, 136 F.3d 914 (2d Cir. 1998); Third Circuit, *Lacap v. INS*, 138 F.3d 518 (3d Cir. 1998); the Fifth Circuit, *Nolos v. Holder*, 611 F.3d 279 (5th Cir. 2010); and by the District Court in *Licudine v. Winter*, 603 F. Supp. 2d 129, 132-34 (D.D.C. 2009)

("Consistent with the rulings of these Circuits [the Ninth, Second, Third, and Fifth], this Court concludes that Licudine's birth in the Philippines during its territorial period does not constitute birth in the United States for purposes of the Citizenship Clause of the Fourteenth Amendment.").

In the Insular Cases, the Supreme Court found that the direct application of the full U.S. Constitution to a territory turns on whether a territory "has been incorporated into the United States as a part thereof, or is simply held . . . under the sovereignty of the United States as a possession or dependency." *Rassmussen v. United States*, 197 U.S. 516, 521 (1905), *abrogated on other grounds by Williams v. Florida*, 399 U.S. 78, 92 (1970) (contrasting Alaska with unincorporated U.S. territories such as Philippines); *see also Downes*, 182 U.S. at 287; *Boumediene v. Bush*, 553 U.S. 723, 758 (2008) (describing the Insular Cases as standing for a "functional approach to questions of extraterritoriality, which involve discussing the "practical considerations" in determining the extraterritorial application of the Constitution). As a general matter, the Supreme Court has reaffirmed the principle that in an unincorporated territory of the United States, one "not clearly destined for statehood," only "fundamental" constitutional rights are guaranteed. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (citing *Dorr v. United States*, 195 U.S. 138, 148-49 (1904); *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922) (additional citation omitted)). Notably, the Court has found that citizenship

is not within the class of fundamental constitutional rights that would apply to unincorporated territories in the absence of a treaty provision or direct Congressional action. *Downes*, 182 U.S. at 282-83 (contrasting fundamental constitutional rights from rights to citizenship and suffrage).

The uniformity of federal courts' holding that persons born to non-citizen parents in unincorporated territories are not birthright citizens does not only apply to the temporary occupation of the Philippines, however, and Plaintiffs' attempts to minimize those cases' importance fail in light of other federal courts' examination of claims from persons born in other outlying, unincorporated territories still under the control of the United States. In fact, the Third Circuit held in *Ballentine v. United States*, 486 F.3d 806, 813-14 (3d Cir. 2007), that Congress was within its authority to determine that the U.S. Virgin Islands was unincorporated and therefore a person born there was not automatically a citizen who could vote in U.S. presidential elections.

Further, in the most recent case to examine claims like Plaintiffs' and reviewing the situation most analogous to American Samoa, the Ninth Circuit held in *Eche v. Holder*, 694 F.3d 1026, 1030-31 (9th Cir. 2012), that persons born or who lived in the Northern Mariana Islands during the period that it was unincorporated U.S. territory were not birthright citizens nor did their residence in the islands during that period count towards naturalization. In reviewing the

plaintiffs' claims, the Ninth Circuit looked to the governing documents of the Commonwealth as well as Supreme Court precedent and rejected the plaintiffs' contention that the Naturalization Clause applied automatically to those born in the Commonwealth. *See id.*

Specifically, the *Eche* court explained:

> The Naturalization Clause does not apply of its own force and the governments have not consented to its applicability. The Naturalization Clause has a geographic limitation: it applies "throughout the United States." The federal courts have repeatedly construed similar and even identical language in other clauses to include states and incorporated territories, but not unincorporated territories. In *Downes v. Bidwell*, 182 U.S. 244 (1901), one of the Insular Cases, the Supreme Court held that the Revenue Clause's identical explicit geographic limitation, "throughout the United States," did not include the unincorporated territory of Puerto Rico, which for purposes of that Clause was "not part of the United States."

Id. at 287. But in addition to considering the Insular Cases and the longstanding interpretations of the Fourteenth Amendment to outlying, unincorporated territories, the Ninth Circuit also considered the impact of recent Supreme Court jurisprudence and its own decisions when it noted:

> The Court reached this sensible result because unincorporated territories are not on a path to statehood. *See Boumediene v. Bush*, 553 U.S. 723, 757-58 (2008) (citing *Downes*, 182 U.S. at 293). In *Rabang v. I.N.S.*, 35 F.3d 1449 (9th Cir. 1994), this court held that the Fourteenth Amendment's limitation of birthright citizenship to those "born . . . in the United States" did not extend citizenship to those born in the Philippines during the period when it was an unincorporated territory. U.S. Const., 14th Amend., cl. 1; *see Rabang*, 35 F.3d at 1451. Every court to have construed that clause's

> geographic limitation has agreed. *See Valmonte v. I.N.S.*, 136 F.3d 914, 920-21 (2d Cir. 1998); *Lacap v. I.N.S.*, 138 F.3d 518, 519 (3d Cir. 1998); *Licudine v. Winter*, 603 F. Supp. 2d 129, 134 (D.D.C. 2009).
>
> Like the constitutional clauses at issue in *Rabang* and *Downes*, the Naturalization Clause is expressly limited to the "United States." This limitation "prevents its extension to every place over which the government exercises its sovereignty. *Rabang*, 35 F.3d at 1453.

Id.

Here, the Plaintiffs' claims rest on identical arguments to the ones raised by the plaintiffs in *Eche*. Plaintiffs urge this Court to declare that the Fourteenth Amendment automatically confers citizenship on the U.S. nationals of American Samoa, despite, as discussed *supra*, the Constitution's explicit reservation of exclusive authority in the matters of naturalization to Congress – an authority that Congress has properly exercised through INA § 308(1), 8 U.S.C. § 1408(1) – declaring that persons born in an outlying possession of the United States are non-citizen nationals. Further, Congress has specifically addressed the status of American Samoa as an outlying possession in INA § 101(a)(29), 8 U.S.C. § 1101(a)(29). Thus, there has been specific, direct action by Congress on the status of American Samoans and, based upon a century of jurisprudence, those decisions are not only proper, but should not be disturbed by the courts.

C. Plaintiffs' Attempt to Overextend this Court's Holding in *King v. Morton* Not Only Misapplies that Case, but Overlooks this Court's Subsequent Decision in *Hodel*.

Throughout their brief, Plaintiffs urge this Court to stretch its holding in *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975), and apply it to Plaintiffs' claims seeking review of the Department of State's placement of Endorsement Code 09 on non-citizen U.S. nationals' passports. Not only is Plaintiffs' reading of this Court's holding an impermissible overreach, particularly in light of the uniform nature of every federal court decision examining the issue of Congress's exclusive control over birthright citizenship for outlying, unincorporated territories, but it overlooks this Court's other decisions touching American Samoa.

First, in *King*, this Court analyzed whether the right to a jury trial for crimes committed in American Samoa was a fundamental right that extended onto the territory for a U.S. citizen. *Id.* at 1141, 1146. In that context, this Court remanded the issue to the District Court to determine whether the jury trial system would be "impractical and anomalous" to impose on American Samoa. *Id.* at 1147. Plaintiffs have requested that this Court order a similar analysis by the District Court and even attempted to label it error for the District Court to make a specific finding that birthright citizenship is "impractical and anomalous." This analysis would be superfluous, though, because the determination of whether a U.S. citizen's right to birthright citizenship for the citizen and his/her progeny traveled

with him/her to American Samoa is directly answered affirmatively in other portions of the INA. 8 U.S.C. § 1401(c)-(e).

Further, unlike the right to a jury trial examined by this Court in *King*, the issue of whether non-citizen nationals on American Samoa are birthright citizens has been squarely addressed by Congress and the Congressional determination has been reflected in action by the executive branch, namely, the usage of Endorsement Code 09. This posture makes the case much more analogous to this Court's decision in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Hodel*, 830 F.2d 374, 384-86 (D.C. Cir. 1987), than *King*.

In *Hodel*, this Court analyzed a claim for trespass against an American Samoan family who intruded onto a tract of land the Church had purchased. *See id.* at 375. After the High Court of American Samoa found in favor of the American Samoan family and held that the land in question was actually communal land, the Church brought an action in the District Court alleging error by the High Court and violation of due process. *See id.* Upon reviewing the Church's claims, this Court held that for unincorporated territories such as American Samoa, which has "wholly dissimilar traditions and institutions," *Reid v. Covert*, 354 U.S. 1, 14 (1957), the Supreme Court has determined that "the guarantees of the Constitution apply only insofar as its 'fundamental limitations in favor of personal rights' express 'principles which are the basis of all free

government which cannot be with impunity transcended.'" *Hodel*, 830 F.2d at 385. Further, this Court found that the Secretary of Interior's plenary authority over the Territorial judiciary authorizes the Secretary to review decisions of the High Court for conformity with constitutional requirements and, therefore, no due process claim existed. *See id.* at 383 n.58 (citing *King*, 520 F.2d at 1144).

Thus, this Court re-affirmed in *Hodel* the unique nature of American Samoa and the limitations of the application of the U.S. Constitution to the unincorporated, outlying territory. Based on its reading of this Court's binding precedent, the District Court correctly applied the holding in *Hodel* as reinforcing the doctrine that, based on the Congressional determinations set forth in INA § 308(1), 8 U.S.C. § 1408(1) and INA § 101(a)(29), 8 U.S.C. § 1101(a)(29), those born on American Samoa to non-U.S. citizen parents are U.S. nationals, but not U.S. citizens by virtue of birth on American Samoa.

IV. CONTRARY TO PLAINTIFFS' ALLEGATIONS OF INCONVENIENCE, PLAINTIFFS HAVE OTHER REMEDIES WHICH DO NOT REQUIRE JUDICIAL INTERVENTION.

Plaintiffs' complaint fails as a matter of law and Plaintiffs' brief provides no reason to disturb the District Court's dismissal of it. Simply stated, the plain language of the Constitution, the overwhelming weight of statutory and case law authority, as well as the practical implications of Plaintiffs' requested relief prevent Plaintiffs' claims from surviving. In their complaint and their initial brief here,

Plaintiffs have attempted to buttress their claims with descriptions of alleged opportunities lost and concern for their progeny due to their status as non-citizen U.S. nationals. Plaintiffs, however, not only downplay their current and ongoing ability to naturalize as U.S. citizens, overlook their affirmative choices not to attain citizenship, but also ignore the manner in which all other outlying possessions have achieved birthright citizenship – Congressional action.

First, as Plaintiffs acknowledge, they are eligible to apply for naturalization at any time of their choosing through travel to the United States and successful completion of the naturalization process. In fact, several of the individual Plaintiffs resided or currently reside in the United States and can undertake this process at any time. (*See* JA at 15-17.) Further, Plaintiffs' claims of concern for their children and grandchildren's status could have been alleviated through their own naturalization as persons born on American Samoa to U.S. citizen parents qualify for birthright citizenship. 8 U.S.C. § 1401(e).

Additionally, Plaintiffs repeatedly refer to both their own military service and the service of other American Samoans, particularly during times of armed conflict. (Appellants Br. at 5, 7-8, 58.) But Plaintiffs ignore the fact that federal law provides a pathway to citizenship for persons serving in the military during times of conflict, 8 U.S.C. § 1440(a), and that those stationed in the United States during peacetime are immediately eligible for naturalization due to their status as

U.S. nationals.

Finally, the manner in which the entire territory's inhabitants could acquire birthright citizenship would be to follow the path beaten by others: Congressional action. As the elected American Samoan representative to the U.S. Congress, Congressman Eni Faleomavaega has made plain, he stands ready to introduce and lobby for such legislation should the people of American Samoa determine that birthright citizenship is in their interests. Congress has not hesitated to provide this right when called upon. In fact, Congress affirmatively acted to bestow automatic, birthright citizenship on: (1) Puerto Rico, 8 U.S.C. § 1402; (2) the Panama Canal Zone during its period as a U.S. territory, 8 U.S.C. § 1403; (3) pre-statehood Alaska, 8 U.S.C. § 1404; (4) pre-statehood Hawaii, 8 U.S.C. § 1405; (5) the U.S. Virgin Islands, 8 U.S.C. § 1406; (6) Guam, 8 U.S.C. § 1407; and (7) the Commonwealth of the Northern Mariana Islands, Pub. L. No. 94-241, § 301, 90 Stat. 263, 265-66. Thus, it was action by Congress that granted citizenship to the citizens of the unincorporated, outlying territories, not mere exercise of authority by the United States Government over its physical territory.

Plaintiffs' arguments not only overlook this process, but their requested relief invites impractical results. First, as discussed immediately above, Plaintiffs ignore the history of every other similarly-situated outlying possession of the United States, each of which gained birthright citizenship for its inhabitants

through Congressional action only. Second, Plaintiffs' argument invites an utterly impractical result. When would a U.S. territory suddenly shift from an outlying possession to one whose inhabitants receive automatic birthright citizenship—a period of years to be determined by a Court? Indeed, the only practical and efficient process of making this determination is the one in place: each individual territory decides for itself when it wishes for its inhabitants to receive birthright citizenship and Congress responds by deciding whether to issue a statutory grant of this privilege. Therefore, because this process not only comports with the Constitution, but also preserves the ability of territories to work with Congress to determine their own levels of integration into the United States, it is not only proper, but the preferred method to judicial determinations made by courts sitting thousands of miles away. Thus, the judgment of the District Court was plainly correct and should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing Brief for Appellees complies with Rule 32 because it has been prepared in a proportionally spaced typeface, using Microsoft Word's 14-point Times New Roman font, and contains 11,436 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of August 2014, the foregoing Brief for Appellees has been served through the Court's ECF system on all counsel of record.

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